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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-73

THE PILLSBURY COMPANY, *et al.*,
*Petitioners,*

v.

MARCELINE DONALDSON.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### Statement of the Case

This action was commenced on April 3, 1974, by respondent Marceline Donaldson, a black female former employee at the Pillsbury Company headquarters in Minneapolis, Minnesota. Plaintiff alleged that the company and six individual defendants engaged in discrimination against women and blacks in hiring, discharge, and terms and conditions of employment. The complaint alleged a class action on behalf of black and female employees and applicants at the headquarters, subject to the appropriate statute of limitations.

The defendants, petitioners here, opposed much of the discovery sought by plaintiff, and the district court "severely limited the scope of discovery." A-7. Petitioners'

response to plaintiff's first interrogatories failed to fully answer 35 questions out of 62 interrogatories. Respondent filed a motion to compel discovery, but the magistrate, after an *ex parte* conference with petitioners' counsel (Transcript of Proceedings, April 24, 1975, p. 10), summarily denied the motion without discussing the propriety of the particular disputed questions. App. 93a. In response to these interrogatories petitioners also furnished plaintiff with computer printouts of data on the company's headquarters workforce. The printouts proved largely unusable because they were incomplete, were internally inconsistent and contained no data on race prior to 1972, since the petitioners claimed that such data did not exist. Respondent sought production of petitioners' computer tapes in order to prepare her own printouts, but the magistrate summarily denied this request on September 9, 1975, on the ground that petitioners had already provided the needed information, an order which the district court upheld on October 30, 1975. The petitioners furnished significant additional statistical information, including the pre-1972 data previously claimed not to exist, on January 2, 1976, a year after it was requested and only four days prior to trial. The district court denied respondent's motion for a continuance, and directed the parties to proceed at once to trial.

On January 20, 1975, the district court first heard respondent's motion for class certification, but deferred ruling to permit additional discovery with regard to the class claim. On September 15, 1975, while respondent's motions to compel discovery remained unresolved and when transcripts of 14 of her witnesses had not yet been completed or filed, the district court reconsidered the class action motion and refused to certify the class. The sole reason relied upon by the district court was that respondent's claims were not typical of those of other women and blacks because she



"was specially hired outside normal channels to do a special kind of work." A-31.

The case was tried in January, 1976 over the objections of respondent. Because of a then pending interlocutory appeal, the 30 volume pre-trial record was in the office of the clerk of the Eighth Circuit from before the beginning of trial until the district court's decision of February 5, 1976. The district court ruled irrelevant respondent's evidence of systematic discrimination against women and blacks, and refused to permit testimony by 14 of the 15 class members called by respondent to show incidents of discrimination similar to that claimed by respondent. At the end of this somewhat unusual proceeding the district judge agreed to defer action until certain additional depositions could be taken and filed; seven days later, before those depositions could be filed, the district judge issued a Final Memorandum and Order dismissing respondent's claim.

On appeal the court of appeals reversed the denial of class certification as an abuse of discretion. It noted that respondent, though coming to the defendants' attention through the Minneapolis Urban Coalition, had been interviewed and selected in the normal manner, and differed from others of her race and sex only in that she had entered the company at a higher level, and was one of the few black women ever hired into a professional or managerial position. The court of appeals concluded that this distinction was legally irrelevant under Rule 23. The court of appeals also held that the district court had erred in excluding evidence of class wide discrimination on the basis of race and sex, and it remanded the respondent's individual claims so that they could be reconsidered in light of "the additional evidence of patterns and practices which will be available to the entire class." A-17. Because of this

disposition the court of appeals found it unnecessary to decide whether the district court's limitations on discovery were improper.

## Reasons for Denying a Writ

1. Petitioners seek review of the court of appeals' class action decision on a number of grounds. The questions actually presented by this case are somewhat different than those formulated in the petition.

Petitioners suggest that this case presents an issue expressly not reached by this Court in *East Texas Motor Freight System, Inc.* v. *Rodriguez,* 45 U.S.L.W. 4524 (1977), "whether a Court of Appeals should ever certify a class in the first instance." Petition, pp. 7-8. The question left open in *Rodriguez,* as the words "in the first instance" make clear, is whether a court of appeals should pass on the propriety of a class action *before* the issue has been presented to the district court. In *Rodriguez* no motion for certification had ever been made in the district court, which thus had no occasion to consider whether the requirements of Rule 23 were met. The company in *Rodriguez* urged that the proper role of an appellate court was to review the certification decision of the district court, not to resolve the Rule 23 issues *nisi prius.* This case presents no such issue. A motion for class certification was timely made and fully litigated in the district court; the district court relied upon only one ground for denying certification, and the court of appeals, having held that ground insufficient, properly concluded that certification should be ordered.[1] The procedure followed by the

[1] Although Rule 23 establishes a number of prerequisites to certification, petitioners in the court of appeals only questioned whether the necessary typicality was present. Nonetheless, the court of appeals, after finding typicality, reviewed the other requirements of the rule and found they were satisfied. A-12, n.5.



court of appeals here was the normal appellate practice, and it is difficult to imagine a more sensible alternative.[2]

The second issue posed by petitioners relating to the class is whether the court of appeals erred in approving the class "without definition or discussion merely by negative implication from two brief footnotes." Petition, p. 3.[3] Insofar as petitioners seek a review by this Court of whether an appellate court could decide a class action issue "without discussion", that question is simply not raised by this case; the Eighth Circuit opinion considers the class action issue at length. A-6 to A-13. With regard to the definition of the class, respondent sought to represent a class of all blacks and females who are or were employees at the Pillsbury headquarters or who had been denied employment on the basis of race or sex, subject to the applicable statutes of limitations; the district court noted no difficulty with this definition, and neither in their brief nor in their petition for rehearing in the court of appeals did petitioners suggest any alternative class definition.

Petitioners urge at length that the court of appeals erred in certifying the class "merely on the basis of allegations." Rule 23 establishes a number of prerequisites, some factual, others legal, to the maintenance of a class action. Rule 23(a)(3), with which petitioners are concerned, requires that the "claims" of the class representative be typical of the "claims" of the class. While other requirements, such

[2] Theoretically the court of appeals could have vacated the denial of certification and remanded for further proceedings consistent with its opinion, but the only consistent proceeding would be the granting of certification. Petitioners do not suggest that the authority of the appellate courts is limited to vacating a series of erroneous Rule 23 decisions in a single case until the errant trial court discovers the correct position.

[3] This issue, though encompassed within question (1)(b), is not pressed in petitioners' "Reasons for Granting the Writ."

as numerosity, require factual evidence, Rule 23(a)(3) deals with the relationship between the claims asserted by the representative and the claims asserted on behalf of the class.[4] Like the requirement that a complaint state a claim on which relief can be granted, the Rule 23(a)(3) requirement is literally a requirement about allegations, and an application of that rule cannot be overturned simply by denoting the allegations "mere". Plaintiff cannot be obligated, in order to obtain certification, to prove that both she and the class members were in fact victims of discrimination by Pillsbury, since such proof would be the equivalent of a trial on the merits. Even if some such proof were required, the extensive affidavits and offers of proof as to class discrimination which plaintiff offered in connection with her motion for reconsideration of the class action denial were sufficient to demonstrate the existence of class claims of discrimination on the basis of race and sex similar to her own claims.

Petitioners also argue that there are "uncontradicted affidavits" that the separate departments at Pillsbury "were and are independently managed" and that "the only common source of policy revealed on the record is the Board of Directors acting through its chairman". This contention is neither accurate nor relevant. Those affidavits were contradicted, and largely discredited, by depositions of petitioners' personnel officials;[5] and the affidavits were

[4] See, e.g. *Rakes* v. *Coleman*, 318 F.Supp. 181, 190 (E.D. Va. 1970); *American Airlines* v. *Transportation Workers Union*, 44 F.R.D. 47 (N.D. Okl. 1968).

[5] The various "companies" described in footnote 7 of the petition are not incorporated as such, and are generally denoted by Pillsbury and its staff as "divisions". App. 115a. These divisions are all located on adjacent floors of two physically connected office buildings in Minneapolis. App. 111a. All personnel activities in the divisions are supervised by a single headquarters personnel office, App. 1079a-80a, whose staff of 62 (as of 1974) administers



merely attached to a company brief in the district court, but never filed or made a part of the record and thus were not before the court of appeals. Rule 23, moreover, does not contemplate that a defendant can defeat a class action motion by arguing or seeking to prove that, even though all its foremen or personnel officials discriminated against blacks or women, each acted independently and the similarity of policy was mere coincidence. So long as Pillsbury is a legal entity these considerations are irrelevant for Rule 23 purposes; if the company's personnel officials, acting independently, in fact pursued different policies regarding minority or female employees, the defendants can establish that at the trial on the merits in order to limit any finding of liability to the departments where discrimination was practiced.

2. Petitioners contend that the court of appeals erred in vacating the dismissal of respondent's individual claims "without disturbing any of the District Court's extensive findings discrediting both the merit of Ms. Donaldson's complaints and her personal credibility." The court of appeals did not purport to substitute its own judgment for that of the district court on these issues, or to direct a finding in favor of respondent, but merely remanded the case to the district court so that the individual claim could be reconsidered in light of "the additional evidence of patterns and practices which will be available to the entire class." A-17. The court of appeals noted that the district court, after denying class certification, had "severely

policies set out in an 85 page personnel manual. P.Ex. 1-429; see Deposition of Henry Brown, April 14-15, May 5, 1975, pp. 18-20, 107-17, 214-34; Deposition of Graham Hatcher, May 16, 1975, pp. 4-10. There is also a single corporate Vice-President for affirmative action who sets goals and timetables for hiring for all the headquarters divisions.

limited the scope of discovery and evidence." A-7. This Court has repeatedly held that evidence of class wide discrimination is extremely relevant to an individual case. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 804 (1973); *International Brotherhood of Teamsters* v. *United States,* 45 U.S.L.W. 4507, 4508-11, 4515 (1977). Where such a pattern of discrimination is established the burden of proof shifts to the defendant to establish that individual class members were not victims of that policy. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 773 n. 32 (1976).

Petitioners suggested below that any evidence of class wide discrimination which respondent might discover or introduce would be irrelevant to respondent's individual claim because they had allegedly established that there were justifiable non-discriminatory reasons for company actions toward Donaldson. This is precisely the argument rejected by this Court in *McDonnell Douglas.* There, as here, the employer urged statistics were "of no utility" since the company had shown a legitimate reason for its action and "the District Court examined an extensive record of the treatment accorded to Green during his prior employment and found that his protestations of discrimination were more imagined than real." [6] This Court held that, even if there was an arguably proper ground for the employer's action, the employee "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision," and that the evidence "that may be relevant to any showing of pretext" includes the employer's "general policy and practice with respect to minority employment." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. at 804-05. That is precisely the type of retrial directed by the court of appeals in this case.

[6] Petitioner's Reply to Respondent's Brief, No. 72-490, p. 13.



Ignoring the problem of restricted discovery noted by the court of appeals,[7] and apparently now conceding that the district court erred in excluding evidence of class wide discrimination, petitioners emphasize in the alternative that the district judge stated he "had considered" the statistical and other class wide evidence offered by respondent. Petition, p. 18. The district judge, however, did not find there was no pattern of discrimination, or that the implications of such a pattern had been overcome by other evidence, but stated that he still believed it to be irrelevant. A-29. The district court's refusal to give any weight to evidence of a pattern of discrimination was clear error under *McDonnell Douglas.*[8]

3. The third question raised in the petition is literally a hypothetical one: *"If* the District Court's dismissal of Marceline Donaldson's individual claims is affirmed, no class having ever been certified in the District Court, can any class be adequately represented in subsequent proceedings in this action before the District Court?" This case simply does not present that question, since the dismissal of the individual claims was reversed on appeal, and

[7] Limitations on discovery were among the reasons cited by this Court for ordering a new trial in *McDonnell Douglas.* 411 U.S. at 800, n. 10.

[8] In *McDonnell Douglas* itself the plaintiff also succeeded in placing in the record before the district court statistics as to the company's general employment practices, and the company suggested that a remand for new trial was therefore inappropriate. Petitioner's Reply to Respondent's Brief, p. 13. The district court in *McDonnell Douglas* had not ruled such evidence irrelevant, but merely failed to discuss it. *Green* v. *McDonnell Douglas Corp.,* 318 F. Supp. 846, 850-51 (E.D. Mo. 1970). This Court nonetheless concluded that a new trial was necessary. 411 U.S. at 807.

it is unlikely that the question will ever arise in subsequent proceedings in this action.[9]

4. Assuming arguendo that the "Questions Presented" were actually presented by this case, none of them would warrant review by this Court. Certification of a class by a court of appeals in the first instance is an uncommon occurrence, and this was not the issue on which certiorari was granted in *Rodriguez*.[10] Whether the court of appeals' decision regarding class certification and the individual claims is supported by the record is of significance in this case alone. Since the action has been remanded for further proceedings, it is likely that some if not all of the issues now pressed by petitioners will be rendered moot by the subsequent proceedings; certainly that will be the case as to the remand of the individual claims, which petitioners oppose only as unnecessary. Petition, p. 18. Petitioners do not assert that any aspect of the decision below is in

[9] We note that the answer to the question raised by petitioners can readily be resolved by reference to the nature and history of the class claims. If the case is, regardless of the status of the individual claim, not a proper class action, the adequacy of plaintiff's representation is irrelevant. If the case would otherwise be a proper class action, but plaintiff never sought certification and her individual claim was properly dismissed, the case would be identical to *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 45 U.S.L.W. 4524 (1977). If the district court heard but erroneously failed to grant a request to certify the class prior to dismissing the individual action, that error could and should be corrected on appeal, since the contrary rule would necessitate interlocutory appeals of all denials of class action certification. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949).

[10] The class action question in the *Rodriguez* petition was "Whether absent a class action hearing or an equivalent opportunity to present evidence on the question of the appropriateness of the class the Court of Appeals may certify the litigation as a class action and enter a finding of liability in favor of the Plaintiff class."



conflict with any other circuit on any issue of law, important or otherwise.

This case also presents a number of independent grounds for affirming the decision of the court of appeals. First, in connection with respondent's unsuccessful interlocutory appeal of the denial of class certification, the clerk of the district court in St. Paul transmitted the entire 30 volume pre-trial record to the court of appeals in St. Louis, where it remained until sometime after February 9, 1976. In the interim, despite plaintiff's request for a continuance, the district judge insisted on trying the case and rendered his final decision on February 5, 1976. Although the district judge recited that he had "considered" all of plaintiff's proffered evidence, that was physically impossible. Second, at the end of trial the district judge agreed to defer any decision until certain depositions had been taken and filed, but then decided the case seven days later without awaiting the transcription and filing of the depositions. App. 17a, 1216a-17a. Third, the district court's decision to severely limit plaintiff's discovery was clearly erroneous in light of *McDonnell Douglas* and *Teamsters*. The court of appeals, because of its resolution of other questions, found it unnecessary to resolve these issues, but they furnish alternative grounds for upholding its decision and thus render inappropriate a grant of certiorari.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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